No. 3206.

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit.

W. P. FRICK,
*Appellant,*
vs.
THE UNITED STATES OF AMERICA,
*Appellee.*

## BRIEF FOR APPELLEE.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.



ANNETTE ABBOTT ADAMS,
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*Solicitors for Appellee.*

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### Statement of the Suit.

This is a suit in equity by the United States seeking relief on the ground of fraud alleged to have been committed in the procurement of a patent to certain public lands therein described, under an application to purchase them as timber lands, the substance of the material averments of the bill being that the application was made by one Robertson, from whom the defendant Frick purchased; that the fraud consisted in false representations and statements made in the

sworn application and the testimony given before the land office by both Robertson and Frick, the latter appearing as a witness therein, on behalf of the applicant as to the character and state of the lands, in this: that it was represented both in the application and in a non-mineral affidavit filed therewith, and in the testimony given on the hearing, that the applicant and witnesses had personally examined the land; that it was unfit for cultivation, but was valuable cheifly for its timber; that it was uninhabited and unoccupied and that it contained no valuable deposits of gold, silver, cinnabar, copper, or coal, and that there were no mining or other improvements thereon; that these statements and representations were false and known to the applicant and said Frick, when made, to be false, and were fraudulently made solely for the purpose of deceiving the land officers of the United States and inducing the issuance of the patent; that it was the fact, and was known to both Robertson and Frick, that the lands had always been more valuable for mineral than for timber and that for a long time prior thereto, and at the time of the entry of Robertson, and the issuance of the patent, and at the time of the purchase of the land from Robertson by Frick, there were located on the land gold quartz and placer mining claims owned by one L. Parker of Grizzly Flat, the location of which appeared upon the records of the Recorder of El Dorado County, wherein the

land was situate, and that on a portion of said lands there were several thousand dollars' worth of mining improvements owned by the said Parker; that these facts were well known to the applicant Robertson at the time he made his application and procured the patent and were fully known to the defendant Frick at the time he gave the testimony and when he made the purchase of the lands; it is alleged that after the transfer of the lands to Frick, Robertson died and that Frick has since held the title to said lands and claims the same and the whole thereof, and that the said claim and the patent constitute a cloud on the plaintiff's title.

The primary relief asked was that the patent be held void and set aside and the lands restored to the public domain and coupled therewith there was a general prayer that the complainant have such other and further relief as may accord with the principles of equity.

Frick answered denying the averments of fact counted upon as constituting fraud and alleged that since prior to the commencement of the action he had ceased to have any interest in the land.

It appeared upon the trial in the lower court that the land had been sold by Frick to the California Door Company, which company was admitted to have been an innocent purchaser for value. For the latter reason the Court declined to cancel the patent but granted as relief a judgment against appellant

Frick in the sum of $6,475.95, being $32.50 per acre, the full amount received by Frick for the land upon its sale to the California Door Company.

As appellant has attacked the sufficiency of the evidence to sustain the judgment of the lower court, we feel it necessary to review as briefly as possible the testimony of the several witnesses called for the appellee and the appellant in the trial court.

This review of the evidence, however, will be made as we proceed with our argument on the questions involved. Through that argument we will endeavor to bring to the Court's attention all the testimony produced at the trial.

## ARGUMENT.

Two questions are presented for determination on this record.

(1) Does the evidence sustain the charge of fraud against the defendant Frick, and if so, (2) is the Government entitled, in this form of action, to recover the value of the land in money damages as compensation for the fraud through which it has been deprived of its land? The lower court found in the affirmative on both these questions and it will be our purpose to point out wherein and why the decision of the lower court should be affirmed. We shall and do maintain that the evidence introduced at the trial is amply sufficient to sustain the decree; that the

findings of the lower court on a question of fact are presumptively right and will not be disturbed unless an appellate court can clearly see that the decree is opposed to the weight of the evidence; that different, unprejudiced minds might with equal reason draw different inferences and reach different conclusions, but where the lower court has considered conflicting evidence and made a finding thereon, the finding will be permitted to stand, unless obvious error has intervened in the application of the law or some serious and important mistake appears to have been made in the consideration of the evidence; that where the court below, in an equity suit, on a full consideration of all the proofs, comes to a conclusion on a question of fraud, this Court will concur with the court below, although the evidence raises some doubt; that a decree cancelling a patent on the ground that the entry was fraudulent will not be disturbed on appeal where the evidence offered in behalf of the defendants is outweighed by the inferences to be drawn from their conduct, and finally that the evidence introduced in support of complainant's bill of complaint is clear, unequivocal and convincing and that the Government is entitled in this suit to a money judgment, the defendant having parted with title to an innocent purchaser for value.

## POINTS AND AUTHORITIES.

### I.

### THE EVIDENCE IS AMPLY SUFFICIENT TO SUSTAIN THE DECREE.

It seems to us that the questions involved here are elementary and that there is more fact than law involved. An examination of the evidence by the legal mind should be sufficient to determine the issues without the aid of legal authority. Counsel for appellant lays stress on the fact that in cases of fraud, when it is proposed to set aside, to annul, or to correct a written instrument for fraud or mistake in the execution of the instrument, itself, the testimony upon which this is done "must be clear, unequivocal and convincing and that it cannot be done by a purely preponderance of evidence which leaves the issue in doubt." Several cases are cited in support of this principle and with that principle we have no just cause of complaint. But we submit that the rule relied on is a measure or rule for the court trying the case to use in determining whether fraud has been committed. It is notice to the trial court that the evidence in a case of fraud must be "clear, unequivocal and convincing," and that no other measure will come up to the standard required. The fact that the trial court found in favor of the Government is indicative of the fact that the Court found the evidence, on the question of fraud, to be "clear, unequiv-

ocal and convincing." Counsel raised the question of a preponderance of the evidence as not being sufficient and to this we say the lower court must have considered that the testimony for the defendant was not of any weight whatever. Certainly the record shows no abuse of discretion on the part of the trial court. The witnesses were all before the Court. He had an opportunity of observing their demeanor on the witness stand, their motives for testifying and their interest, if any, in the result. It was for him to say who was to be believed and for him to disregard the testimony of such witnesses as did not produce conviction in his mind. We submit that an examination of the testimony will show that the Court could not have come to any other conclusion than the one expressed in the opinion of the Court and we believe that said opinion is the best answer to counsel's argument in the premises. As the Court truly states "all the evidence introduced in behalf of the defendant was of a negative character." We shall quote from the proceedings and testimony, as briefly as possible, to assist this Court in seeing clearly that the evidence was sufficient in every particular to sustain the decree.

The evidence shows that Frick was buying and selling every acre of timber land that he could get his hands upon in the vicinity of the property in question. In the deed he made to the California Door Company there was included ten other tracts, some

adjacent, and all within the same locality. Some of them had been acquired by the defendant immediately after final certificate had been issued to the entry man. The abstracts of title are lined with filings of mineral claims. Parkers' Mining Claims were of record in the office of the Recorder of El Dorado County and Frick's own testimony indicates, at least a claim on his part, that he was well acquainted with all the lands in the neighborhood. He testified that he personally examined the land; that it was unfit for cultivation, but was valuable chiefly for its timber; that it was uninhabited and unoccupied; that it contained no valuable deposits of gold, silver, cinnabar, copper or coal, and that there was no mining or other improvements thereon. These statements were made by him, under oath, at the time application was made at the Land Office, and if untrue, were a fraud on the Government.

Kingsbury, the Government Engineer, testified (Tr. 37) that he found minerals on the land; that there were mining improvements thereon; that there was a cabin on the place (Tr. 38) in good condition and mining work had been done for several years. He stated: "It was my opinion, from finding that gold there, that there was sufficient indication for a man to go ahead and develop the land with the expectation of making it pay." He further stated (Tr. 39) that it would be worth working and that it was valuable mineral land. He also stated he would be

willing to spend his own money in developing the property as mineral land; that he had made a study of mining formation of this particular country; that he had read some of the United States Geological reports on it and was familiar with the Plymouth Quadrangle. He stated he had read the said reports (Tr. 40) sufficiently to tell the Court that this country was and is mineral bearing. He stated to counsel for Frick that he had examined the Pyramid Peak Quadrangle and the folio and that he had it with him and he offered to show it to counsel for appellant. which offer was declined.

This witness had absolutely no interest in the suit at all and it is strange that counsel for appellant did not care to see the record he had been asking about in the hope of disqualifying the witness. The witness had the record with him; had read it and was willing to produce it in support of his testimony, with the result above indicated. Was it for the reason that the proof, without said record, was "clear, unequivocal and convincing?"

The witness Mauk (Tr. 41) knew the property; knew it was called the Parker Mine. He testified he had been there in 1902 and *"Mr. Parker and his wife were living there."* Parker was running a tunnel and brought out a pan or two of gold while the witness was there. Mauk further testified (Tr. 41) *"I know W. P. Frick. We were at that time in mining. Frick and I talked about Mr. Parker buying the*

*mine of those parties, and the* $1,000 *price that we were informed that he paid for it."* (To digress, Frick in 1907 as a proof witness swore positively he was familiar with the lands in question; that they were timber lands and not mineral lands. The testimony of Mauk shows Frick knew they were mineral lands and were being worked as such by Parker as far back as 1902).

The witness further stated (Tr. 41) that Frick was familiar with the property; that Frick was there with the witness after Parker bought the mine and probably passed over the ground two or three times. The witness further stated there was a house (Tr. 41) on the property when Parker bought the mine, a small house or cabin. There were ditches to the mine. *"The vicinity in which the* (Tr. 41-42) *Parker mine is located was known as a mineral region."* In speaking of his mining business with Frick he stated (Tr. 42) "We put in our plant 1,500 feet of pipe and worked one month and we cleaned up $1,800, with a *small* monitor." This mining was done about two miles from the Parker mine. Finally the witness testified concerning Parker: (Tr. 42) "We loaned or hired him our monitor and as much of our pipe as he wanted. *Mr. Frick was present when we loaded it on a wagon and hauled it over there. It was going to the Parker mine."*

Ellen C. Parker, the wife of Parker, testified: (Tr. 42) "At one time I lived upon a mine that was

called the Parker mine; that was my husband's; he had it and I was up there with him. That is all the home we had—I gave up everything and went up there with him on the mine and he built the cabin himself in El Dorado County. I stayed there most of eight years and more." She stated they owned the mine after the earthquake in 1906 (Tr. 44); that Parker paid $1200 or $1300 for the mine; that they made their living off the mine for eight years; that they had a good many hired men; that ditches, etc., were constructed. In two days they took out over $340; that the cabin was a nice, good cabin with a cellar for provisions; that they dug a well and had a garden.

Meyer, a witness for the Government, testified (Tr. 46) that Parker was living at the mine and made his living from it; that there were two cabins on the ground; that the witness did mining adjoining the Parker claim and "the vicinity in which the Parker claim is located is known as mineral lands. *I knew W. P. Frick and part of his business at this time was buying and selling to the California Door Company timber lands.*"

The last witness for the Government, Megurre, testified (Tr. 47) that the California Door Company paid Frick $32.50 per acre for the land.

This was the Government's case and we submit that the proof was "clear, unequivocal and convincing." Not one witness called for the Government had any interest or motive for testifying. On the con-

trary, it is hard to find a witness for Frick who did not have some motive or interest in seeing Frick successful. Nearly every one of them went upon the land years afterwards at Frick's request and made an examination with the end in view of testifying for Frick. Remick, the first witness, did not know the value of the land when he was the first witness for the defense, but as the last witness for the defense he testified the land was worth about $10 per acre (Tr. 51 and 75). Remick's testimony shows he was a timber cruiser, not a mining man (Tr. 47); that he made his examination on May 5th or 6th, 1916. He admits (Tr. 48) that he saw some evidence of mining on the land; that he saw prospect holes on the land; that there was evidence of ground-sluicing having been done on the property. He stated (Tr. 49) that personally he would not take the land up as mineral land. (It must be remembered the witness was a timber cruiser). In answer to a question by the Court he stated (Tr. 49) *that he was preparing himself as a witness* when he went upon the land; that he went there to cruise the land as to its timber value; that those who sent him did not ask him to pan the gravel on the surface to find out whether there was any prospect there; that he made no particular examination (Tr. 50) to see if there were quartz outcroppings. He admitted (Tr. 51) that there was a ditch on the property and two cabins in a dilapidated condition. (This was in May, 1916, and we believe the

comments of the Court on this testimony as it was being adduced clearly indicate the lack of value it had as evidence in the case).

Frick took the stand in his own behalf, and as indicated before in this brief, it is purely of a negative character. It discloses that his memory is excellent for Frick but very treacherous and unreliable for the Government. He tells (Tr. 42) that he had been over the property a year or two before he was a proof witness for Robertson; that he had experience in mining in that locality and elsewhere; that he and Mauk were partners (Tr. 53) and their mining was a failure. (Mauk says they made $1,800 in one month with a small monitor within two miles of the Parker mine.) (Tr. 42). On cross-examination Frick stated that he did not know when he was a proof witness. (Tr. 54) that there were improvements on the property; that he did not know a shaft had been sunk and did not know that Parker was living there. He admitted that Mauk and he had evidently lent Parker a pipe and a monitor to work the Parker mine, but stated *it had passed out of his memory.* He admitted that Mauk and he had probably discussed what Parker had paid for the mine but that it likewise had passed out of his recollection and that it was "out of his recollection" in 1907 when he was a proof witness. He stated (Tr. 55): "*Robertson made his final proof I think October* 28, 1907, *and I bought the property about nine or ten days afterwards. The deed was*

*recorded September* 29th, 1909, nearly two years later." He stated (Tr. 56) that he surveyed the property in 1904 and that there were indications of what he termed "abandoned cuts."

We desire at this point to make some comment on Frick's testimony. We believe it shows conclusively that when he was Mauk's partner he had knowledge, first hand, that the Parker property was mineral land; that it was being operated successfully by Parker as mineral land and that when he desired to perpetrate a fraud on the Government, these matters very conveniently passed out of his recollection. Furthermore, his testimony shows that he surveyed the land as far back as 1904 and he either made a very superficial survey of the land or was blind because, outside of himself, *there was not a single witness called for the Government or for Frick who did not testify that there were mining and other improvements on the land.* Certainly a man of Frick's experience in taking up timber claims should, if he were acting in good faith, have been at least more cautious than he was before subscribing to the oath he took as a proof witness that this was not mineral land. Again, if he meant no fraud and desired to commit no fraud, why did he purchase the property from Robertson within a few days after Robertson obtained title and then did not record his deed for nearly two years afterwards? Why didn't he examine the records of El Dorado County to ascertain if

any claim whatever was on this land? Certainly the record in this case does not disclose that Frick is a fool or incompetent. On the contrary, it is fair to assume that he was a keen business man; an expert in getting public lands through entrymen, buying them at a small figure and selling them at a handsome profit. The end with Frick justified the means and fraud against the Government or an individual was of no concern to him so long as the business in which he was engaged brought a handsome profit to him. Robertson was a mere tool in his hands. Robertson was a fisherman in his leisure hours; Frick was always a cunning business man, seeking always to satisfy his own selfish ambition and his greed for gain. We believe as the Supreme Court of the United States has said in Booth Kelley Lumber Company vs. United States, 237 U. S. 481; 59 L. ed. 1058, quoting from the syllabus "the evidence offered in behalf of the defendants is outweighed by the inferences to be drawn from their conduct."

The other witnesses for the defense expressed some doubt as to the character of the land in question but all saw the evidences of mining on the property. Anthony testified (Tr. 59) the property was a mining claim in 1907; that there was one cabin with three rooms and a big fire place and Parker asked $10,000 for the claim. The witness further states that he would not call it an extra good purchase for timber but that there was some good timber on it. The wit-

ness Taylor stated (Tr. 61) there had been some mining done on the premises. On cross-examination he admitted that when he was on the land as proof witness (Tr. 63) he did not inspect the house to see if any one was living there; that there was a road leading to the house that any one could see and that his reason for stating as a proof witness that the property was unimproved was because "I *supposed* it was abandoned property." He admitted he knew that Parker's wife and son had lived on the premises for several years.

The testimony of the witnesses White and Seymour (Tr. 66, 67, 68, 69 and 70) throw little light on the situation here and we pass their testimony without comment.

The testimony of Norris English, the mining engineer called for the defendant (Tr. 70 to 78 inclusive) is replete with instances of his partisanship and his difficulties with the Court. Nevertheless this testimony shows that there were improvements on the property and indications of mining operations. He denies that a man and his wife could live on the property from the money made out of the mine notwithstanding the undisputed fact that Parker and his wife had done so for a number of years. He admitted at times that mining engineers are deceived on whether certain properties are good mining properties or not. (Tr. 74).

The foregoing is all the testimony in the case and we repeat that the only witness who materially attempted to controvert the complainant's evidence was the defendant Frick.

Before leaving the evidence, let us point out that counsel in their brief (page 30) refer to the fact that Mrs. Parker did not state in her testimony that the gold she testified about was obtained from *"any part of the property described in plaintiff's complaint."* This statement shows the weakness of appellant's position. He cannot find anything to substantiate his claim and he proceeds, through counsel, to grasp at straws like a drowning man. No one with a good cause would raise such a question. "He who seeks equity must do equity." "One must come into equity with clean hands," and it might be added their hands should remain clean after they get into equity. Furthermore, if Mrs. Parker were not testifying about the property in question, her whole testimony would be incompetent, irrelevant and immaterial and counsel would have seen that the same was objected to and stricken out. Failing to do so, they admit that her testimony referred to the identical land described in the bill.

In addition to this Mrs. Parker testified that she lived at the mine with her husband and the witness Mauk testified "Mr. Parker and his wife were living there," meaning at the mine, and there is no question about what mine he was speaking of (Tr. 41). We

submit, therefore, that the evidence of fraud is not only "clear, unequivocal and convincing," but that there is no evidence whatever to the contrary.

## II.

## THE FINDINGS OF THE LOWER COURT ON A QUESTION OF FACT ARE PRESUMPTIVELY RIGHT AND WILL NOT BE DISTURBED UNLESS THE APPELLATE COURT CAN CLEARLY SEE THAT THE DECREE IS OPPOSED TO THE WEIGHT OF THE EVIDENCE.

*Lansing vs. Stanisics,* 94 Fed. 380.
*Metropolitan Bank vs. Rodgers,* 53 Fed. 776.
*Snider vs. Dobson,* 74 Fed. 757.
*McKinley vs. Williams,* 74 Fed. 94.
*Man vs. Kline Guaranty Savings Bank,* 86 Fed. 51.
*Kunsemiller vs. Hill,* 86 Fed. 198.

In view of what has been said already we believe that there is nothing in this suit to show that the decree appealed from is opposed to the weight of the evidence. The decree in an equity suit is a solemn act and is not to be disturbed without an express and an explicit showing that it is opposed by the weight of the evidence. Let counsel for appellant show where the weight of the testimony is against this decree.

III.

DIFFERENT UNPREJUDICED MINDS MIGHT WITH EQUAL REASON DRAW DIFFERENT INFERENCES AND REACH DIFFERENT CONCLUSIONS BUT IF THE LOWER COURT HAS CONSIDERED CONFLICTING EVIDENCE AND MADE A FINDING THEREON, THE FINDING WILL BE PERMITTED TO STAND.

*Metropolitan Bank vs. Rodgers,* 53 Fed. 776.
*Snider vs. Dobson,* 74 Fed. 757.

The courts of equity of appellate jurisdiction will where the Court below on a full consideration of all the proofs comes to a conclusion on a question of fraud concur with the court below although the evidence raises some doubt.

See *Syllabus Parker vs. Phellplace,* 17 L. Ed. 675.

A decree cancelling a patent on the ground of fraud will not be disturbed on appeal where the evidence offered in behalf of the defendants is outweighed by the inferences to be drawn from their conduct. See *Booth-Kelley Lumber Co. vs. U. S.* cited *supra.*

Counsel lay stress on the proposition that where land was once mineral land it makes no difference

so long as, at the time of filng a timber claim, it was not mineral property.

We submit in 1907, when Robertson took steps to have issued to him a patent under the timber and stone act the evidence shows that this was mining property and the only testimony offered to prove the contrary was based on examinations made of the property in 1916, *nine years afterwards.*

## IV.

## THE COURT HAS A RIGHT TO GIVE A DECREE FOR DAMAGES IN THE AMOUNT SPECIFIED NOTWITHSTANDING THE FACT THE CASE WAS ON THE EQUITY SIDE OF THE COURT.

The evidence showed conclusively that the defendant before suit parted with title to an innocent purchaser and under the prayer for general relief the Court had the power to give a money judgment for the value of the property.

*Tyler vs. Savage,* 143 U. S. 79.
*Lockhart vs. Leeds,* 195 U. S. 427.
*Southern Pacific vs. U. S.,* 200 U. S. 341.
*Cooper vs. U. S.,* 200 Fed. 869.
*Johnson vs. Carter,* 120 N. W. 320.

Counsel cited the Act of March 2, 1896 (29 Stat. At L 42, 43) in support of the contention that in a case of this character the Government can only recover damages to the amount the Government would

receive upon issuing a patent. This Act applied alone to patents issued for railroad or wagon road grants and has no application here. We believe the opinion of the lower court disposes of this contention in the most effective way and we call the Court's attention to that particular part of said opinion which reads as follows:

> "The only question remaining is as to the measure of the damages to be awarded in relief. The defendant contends that this may not exceed the price at which the land was sold by the Government—$2.50 per acre—and in that regard relies upon the provisions of the Act of March 2nd, 1896 (29 Stat. at L. 42, 43), entitled: 'An Act to provide for the extension of the time within which suits may be brought to vacate and annul land patents, and for other purposes'; but an examination of the provisions of that act will disclose that it has no application to a case of this character, but deals solely with the rights of bona fide purchasers in instances where the patent has issued erroneously. It does not affect cases proceeding like the present, on the theory of fraud in the procurement of the patent. In cases of the latter character, the principle has always been enforced that one guilty of fraud upon the Government is not to be permitted to benefit by his misdoing; that having deprived the Government of property to which it is entitled, the latter may justly claim the return of the entire value of that of which it has been deprived. That was, as will be seen, the measure of damages sustained by the Circuit Court of Appeals in *Cooper vs. United States, supra,* and is implicitly recognized as the proper measure in the other cases cited.
>
> Under this rule, it appearing that the defendant has sold the land in question, which he acquired in wrong of the Government's rights, for

> the price of $32.50 per acre, I am of opinion that that figure should be the measure of the Government's recovery. Let a decree be entered accordingly." (Tr. 34 and 35).

Other minor points are raised by appellant on pages 38 and 39 of his brief but we submit they are of no merit and in any event should have been raised in the lower court by motion to dismiss, motion to make more definite and certain or other like motion. In the absence of such motion, appellant cannot be heard to complain now.

## CONCLUSION.

We submit, therefore, that the record shows a clear case of fraud on the part of the appellant Frick and an intentional fraud at that; that he went into the entire transaction with his eyes open and with the deliberate and preconceived design to defraud the Government and that he succeeded in so defrauding the Government and now comes into equity, not only to be relieved of his own fraud but also to take the position that he should be permitted to profit by his fraud because the Government price of the land was less than the price he realized on the sale of it. If equity favors such litigants then we have utterly failed to grasp the elementary principles of that branch of the law designed solely, as we understand it, to aid those who act in conscience and in justice and who invoke its aid with clean hands. Good faith alone is entitled to consideration from the chancellor

and we believe that in this suit it is manifest that appellant Frick at no time so acted with his Government.

For the foregoing reasons we respectfully submit the judgment of the District Court should be affirmed.

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